

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**



U.S. Citizenship  
and Immigration  
Services

B6

**PUBLIC COPY**

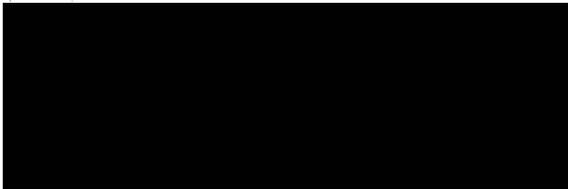


File: [Redacted] Office: VERMONT SERVICE CENTER Date: **OCT 02 2006**  
EAC-04-186-50074

In re: Petitioner: [Redacted]  
Beneficiary: [Redacted]

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a roofing company and seeks to employ the beneficiary permanently in the United States as a roofer ("Roofing Labor"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's April 13, 2005 denial, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered labor certification wage from the priority date until the beneficiary obtained permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. See 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

---

<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001. The proffered wage as stated on Form ETA 750 for the position of a roofer is \$14.80 per hour, 40 hours per week, which is equivalent to \$30,784.00 per year. The labor certification was approved on October 17, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on June 4, 2004. On the I-140, counsel listed the following information related the petitioning entity: established: 1992; gross annual income: \$500,000.00; net annual income: \$50,000.00; and current number of employees: 8; wages per week: \$592.00.

On November 1, 2004, the Service Center issued a Request for Additional Evidence ("RFE") requesting additional documentation regarding (1) the beneficiary's prior training and experience to show that he met the requirements of the ETA 750; and (2) the petitioner's ability to pay the beneficiary the proffered wage from 2001 to the present, specifically for the petitioner to send copies of its 2001 and 2002 federal tax returns, or alternatively annual reports, or audited financial statements.

**The petitioner responded.** On April 13, 2005, the director denied the case finding that the petitioner's response was insufficient to document that the petitioner's ability to demonstrate to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed.

We will initially examine the petitioner's ability to pay based on the record and then consider the petitioner's additional arguments raised on appeal. The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages. CIS will consider the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B signed by the beneficiary on April 16, 2001, the beneficiary listed that he has been employed with the petitioner, [REDACTED] and Associates, from January 1999 to January 2001.<sup>2,3</sup>

---

<sup>2</sup> The time period that the beneficiary worked for the petitioner is unclear from the record. On Form ETA 750B, the beneficiary listed that he was employed from January 1999 to January 2001; on Form G-325, dated November 11, 2002, but filed June 4, 2004 with the beneficiary's I-485 Adjustment of Status application, the beneficiary did not list that he was employed by any employer in the last five years; in a letter dated January 23, 2005, [REDACTED] CEO of [REDACTED] and Associates, provided that the beneficiary was employed from May 2000 to March 2003; a payroll ledger shows the final payment to the beneficiary was August 6, 2004. The discrepancies or reasons for the different dates is unclear.

<sup>3</sup> Additionally, we note that the petitioner must have intended to employ the beneficiary at the time that the adjustment application was approved. The letter that the petitioner has provided indicates that the beneficiary had ceased employment with the petitioner prior to filing the I-140 petition, and I-485 application. And while the petitioner is not required to employ the beneficiary until the I-485 application is approved, the petitioner

The petitioner submitted W-2 Forms from [REDACTED] which show the following:

| <u>Year</u> | <u>Wage Payment</u> |
|-------------|---------------------|
| 2004        | \$4,437             |
| 2003        | \$4,140             |

Here, two points are relevant: (1) the amount paid in each year to the beneficiary is significantly less than the proffered wage of \$30,784; and (2) the petitioner listed on the Form ETA 750, as well as the petitioner listed on the I-140 Petition is [REDACTED] and Associates,” and not [REDACTED]. Counsel asserts that [REDACTED] Inc. does business as [REDACTED] and Associates.” The petitioner has not provided any documentation to show that this is the case, such as a business license, tax identification form, or articles of incorporation, which might exhibit the corporate registration with the d/b/a designation. However, whether [REDACTED] can demonstrate that it does business as [REDACTED] and Associates, or not, the W-2 statements alone do not establish the petitioner’s ability to pay the proffered wage.

[REDACTED] and Associates additionally submitted a payroll ledger print out, which exhibit payments to the beneficiary in 2000 in the amount of \$19,812.<sup>4</sup> Another payroll ledger print out for [REDACTED] and Associates shows a payment history from January 1, 2001 through January 25, 2005. The last payment to the beneficiary was on August 6, 2004 in the amount of \$575. The ledger shows that the beneficiary was paid a total of \$40,205 from January 2001 through August 2004. As this amount covers a four-year time period, with the beneficiary only paid a little over \$4,000 in 2003 and 2004, the payments are insufficient to document that the petitioner can pay the beneficiary the annual the proffered wage of \$30,784.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner’s federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner’s ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner’s net income figure, as stated on the petitioner’s corporate income tax returns, rather than the petitioner’s gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The tax returns demonstrate the following financial information concerning the petitioner’s ability to pay the proffered wage of \$30,784.00 per year from the priority date. Here, we add the same caveat as above: the petitioner listed on the ETA 750 and the I-140 Petition is [REDACTED] and Associates. The petitioner has submitted tax returns for [REDACTED]. While the tax returns do exhibit that [REDACTED] and [REDACTED] are corporate officers for [REDACTED], the petitioner has not forwarded information to demonstrate that the two companies operate on a “d/b/a” basis, or that the two businesses have a successor-in-

does not indicate in its letter that it seeks to later reemploy the beneficiary. The letter provides for training received, and that the beneficiary is no longer employed.

<sup>4</sup> We note that since the priority date is April 30, 2001, payments to the beneficiary in the year 2000 are not relevant to establish the petitioner’s ability to pay the proffered wage.

interest relationship. A corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns state amounts for taxable income on line 28 as shown below:

| <u>Tax year</u> | <u>Net income or (loss)</u> |
|-----------------|-----------------------------|
| 2003            | not submitted <sup>5</sup>  |
| 2002            | \$0                         |
| 2001            | -\$1,396                    |

From the above net income, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage, even if the wages paid to the beneficiary were added to the net income.

Further, the petitioner cannot demonstrate its continuing ability to pay the required wage under a second test used based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The net current assets for Letusliftit, Inc. were as follows:

| <u>Year</u> | <u>Amount</u> |
|-------------|---------------|
| 2003        | not submitted |
| 2002        | -\$10,839     |
| 2001        | -\$15,107     |

As demonstrated above, the petitioner did not have sufficient net current assets in any year to pay the beneficiary the proffered wage, even if the wages paid to the beneficiary were added to the net current asset totals.

To address counsel's additional arguments on appeal, counsel contends that the petitioner had an additional \$7,801 in available income based on depreciation listed on the petitioner's 2001 tax return. Depreciation as a tax concept is a measure of the decline in the value of a business asset over time. See Internal Revenue Service,

<sup>5</sup> [REDACTED] was granted an extension for filing its taxes in both 2001 and 2002 until September of each calendar year, so that the company's 2003 tax returns might not have been available at the time of filing the I-140, but would have been available at the time of filing the appeal.

<sup>6</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

*Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, depreciation is a real cost of doing business.

The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537

Therefore, the AAO is not persuaded that the petitioner's depreciation can show its ability to pay the proffered wage, which even if accepted, would not demonstrate the petitioner's ability to pay the proffered wage.

Counsel then argues that the 2001 tax return reflects \$676 in cash available at the end of the year. We have considered this amount in the calculation of the petitioner's net current assets, which subtracted from the liabilities on the tax return submitted demonstrates a negative number, -\$15,107.

Counsel further contends that the petitioner received loans from shareholders in the amount of \$24,349, which would be available to pay the proffered wage. CIS accords less weight to loans and debt as a means of paying salary since the loan increases the petitioner's liabilities and will not improve the company's overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel then contends that by combining depreciation, cash, and loans, the petitioner would have funds available to pay the proffered wage. We have addressed each aspect above individually, and each aspect individually is insufficient to pay the proffered wage. The combination of all of the factors listed above does not lead to a different conclusion regarding the petitioner's ability to pay the proffered wage.

Counsel similarly argues that the combination of depreciation, cash, loans, and unappropriated earnings would allow for wage payment in 2002. We have addressed depreciation, cash, and loans above. Regarding unappropriated retained earnings, retained earnings are the total amount of a company's net earnings since its inception, minus any payments made to stockholders. Retained earnings are shown on a corporate tax return on Schedule L and, unlike the current assets shown elsewhere on Schedule L, retained earnings actually represent part of stockholders' equity and represent the portion of a company's non-cash and non-current assets that are financed from profitable operations rather than from selling stock to investors or borrowing from external sources. Assets of a company's shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Counsel finally contends that CIS allows the prior payment of the beneficiary's wage as sufficient to demonstrate the petitioner's ability to pay. We have acknowledged this premise and considered payment to the beneficiary above. Nothing the petitioner has forwarded has demonstrated that it has the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence. Further, and critically we note that the petitioner has not demonstrated its relationship to [REDACTED]. Counsel has only asserted that [REDACTED] does business as [REDACTED] and Associates, but the petitioner has provided no evidence. The unsupported representations of management are not reliable evidence.

Based on the foregoing, we find that the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence. Accordingly, the petition was properly denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.